80-997

No. _____

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,
Petitioner,
v.
DONALD GREER,
Respondent,

•

STATE OF MISSOURI,
Petitioner,
v.
TOMMY BRYANT KENDRICK,
Respondent,

•

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that writs of certiorari issue to review the judgments of the Supreme Court of Missouri in these cases.

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri courts are bound by *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc*, (August 18, 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.529, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980),

rehearing en banc, (August 18, 1980), conflicts with this Court's decision rendered in *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, ____ L.Ed.2d ____ (1980)?

5. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State, supra,* is in accordance with this Court's order of May 27, 1980, vacating judgment and remanding the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States, supra?*

PARTIES

In the Supreme Court of Missouri, the parties were as follows:

State of Missouri, respondent, and Donald Greer, appellant, in cause No. 61548;

State of Missouri, respondent, v. Tommy Bryant Kendrick, appellant, in Supreme Court No. 61936;

State of Missouri, respondent, v. Rollan Anthony Williams, appellant, in Supreme Court No. 61595.

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No. _____

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STATE OF MISSOURI,
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DONALD GREER,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that writs of certiorari issue to review the judgments of the Supreme Court of Missouri in these cases.

OPINIONS BELOW

The opinions in the three cases for which the writ of certiorari is being sought are printed in Appendix A. None of them have yet been published. In alphabetical order the cases are as follows:

State of Missouri v. Donald Greer, Supreme Court No. 61548, opinion filed September 9, 1980;

State of Missouri v. Tommy Bryant Kendrick, Supreme Court No. 61936, opinion filed October 15, 1980;

State of Missouri v. Rollan Anthony Williams, Supreme Court No. 61595, opinion filed October 15, 1980.

JURISDICTIONAL STATEMENT

In *State of Missouri* v. *Donald Greer,* No. 61548, the opinion in the Supreme Court of Missouri was filed September 9, 1980. The opinion affirmed convictions for murder, second degree, and armed criminal action, for each of which Greer was sentenced to life imprisonment, the sentences to run concurrently. On October 15, 1980, the Supreme Court overruled motions for rehearing filed by the State of Missouri and by Greer. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Tommy Bryant Kendrick,* No. 61936, the opinion was filed October 15, 1980. The court affirmed a judgment for robbery in the first degree, for which Kendrick was sentenced to thirty years imprisonment, and reversed four convictions for armed criminal action for each of which Kendrick had been sentenced to life imprisonment, all sentences to run concurrently. Motion for rehearing filed by State of Missouri was overruled on November 12, 1980. The order overruling the motion is reprinted in Appendix A immediately after the opinion in this cause.

In *State of Missouri* v. *Rollan Anthony Williams,* No. 61595, the opinion was filed October 15, 1980. The court affirmed convictions for two counts of robbery in the first degree for each of which appellant had been sentenced to life imprisonment, and reversed two convictions for armed criminal action, for each of which appellant had been sentenced to life imprisonment, all sentences had been directed

to run concurrently. The State of Missouri's motion for a rehearing was overruled November 12, 1980. The order overruling the motion is reprinted in Appendix A immediately after the opinion in this cause.

The present petition is filed within sixty days after the entry of final judgment in all of these cases, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 560.120, RSMo 1969; 560.135, RSMo Supp. 1975; 565.004, RSMo 1978; and 559.225, RSMo Supp. 1976, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

This joint petition is brought as a result of the continuing controversy over the application of federal constitutional double jeopardy principles to the prosecution of criminal defendants in Missouri under the Armed Criminal Action Statute, § 559.225, RSMo Supp. 1976, and in the

same trial, for the felony underlying the armed criminal action charge. In each of the three cases joined in this petition, the Supreme Court of Missouri has issued an opinion relying on the authority of *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980); *vacated and remanded,* 445 U.S. ____ (1980); *decided upon rehearing,* ____ S.W.2d ____ (Mo. banc August 18, 1980); petition for writ of certiorari now pending in this court under No. 80-571. This joint petition is being filed so that, if the State of Missouri prevails in the case of *Sours* v. *State,* it will be able to obtain the vacation of the reversals of the armed criminal action convictions in the cases which are the subject of this joint petition.

The facts in each of the cases, for purposes of the double jeopardy clause, are substantially the same in that each of the respondents were prosecuted under the armed criminal action statute, § 559.225, RSMo Supp. 1976, and also prosecuted for the underlying felony. In the case of respondent Greer, the underlying felony was murder, second degree, § 565.004, RSMo 1978. In the case of respondent Kendrick, the underlying felony was robbery in the first degree by means of a dangerous and deadly weapon, §§ 560.120, RSMo 1969, and 560.135, RSMo Supp. 1975. In the case of respondent Williams, the underlying felony was robbery in the first degree, § 560.120, RSMo 1969.

The issues in this joint petition will be identical to those in the petition in *State of Missouri* v. *William Scott Sours,* No. 80-571, presently pending in this court, and in the subsequently filed petition in *State of Missouri* v. *Wallace D. Counselman, Jr.,* No. 80-754.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that writs of certiorari should issue in each of the cases contained in this joint petition because

they are all based entirely on the authority of the Missouri Supreme Court's holding in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc* (August 18, 1980), which conflicts with recent decisions of this court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours* I), and remanded the case back for further consideration in light of *Whalen* v. *United States,* ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Missouri Supreme Court responded to this Court's directive by rendering an opinion in *Sours* v. *State,* No. 61458 (August 18, 1980) (hereinafter referred to as *Sours* II), wherein the Missouri Supreme Court, after determining unequivocally that the Missouri legislature clearly intended that punishment be imposed for both armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours* I. See *Sours* II, *slip opinion* at 18.

Although the Missouri Supreme Court was presented with the argument that the combined wisdom of both *Whalen* v. *United States, supra,* and *Brintley* v. *Michigan, supra,* expressed this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even where the proof required to establish a violation of the first is necessarily required to prove the second, if the legislature so intends, it nevertheless opined as follows:

> The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing

---

[1]The Missouri Supreme Court's most recent holding in the *Sours* case is identical to original holding made prior to this Court's granting of the State's petition for a Writ of certiorari.

> a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* [citation omitted] C.F. *Whalen* v. *United States* [citation omitted]. Each time a double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. *Whalen* v. *United States,* [citation omitted]; *Simpson* v. *United States,* [citation omitted], *Iannelli* v. *United States* [citation omitted]. See *Jeffers* v. *United States* [citation omitted]. No United States Supreme Court opinion has considered a statute that contained wording similar to, or identical to, that found in Missouri's Armed Criminal Statute.

Sours II, *slip opinion* at 2.

In discussing *Whalen* v. *United States, supra,* the Missouri Supreme Court stated:

> The Court expressly reserved the question whether, had Congress clearly imposed multiple punishments for the same offense, the imposition would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. . . . Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue prosented. [footnote omitted]

Sours II, *slip opinion* at 3.

Before reasserting its position take in *Sours* I, the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its underlying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the statute (See Appendix B), that punishment be imposed for both crimes. *Sours* II, *slip opinion* at 8-18. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent: "The unique wording of armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." *Sours* II, *slip opinion* 17-18 [footnote omitted].

With the "bullet" firmly between their teeth, the Missouri Supreme Court proceeded to readopt their original opinion rendered in *Sours* I, but not without, again, the specter of the United States Supreme Court reappearing:

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen,* was intended to lead this Court [sic] to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause.

> It would grant to the state legislature the power to define meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court [sic] to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

Sours II, *slip opinion* at 22-23.

Petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to elucidate the law of double jeopardy herein raised. In *Brintley* v. *Michigan, supra,* the appellant sought to present the following question to this Court:

> Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b) where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in armed robber case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies.

26 Crim.L.Rep. 4113. (§ 750.227(b), M.C.L.A. appears in Appendix D).

Petitioner submits that this Court's summary dismissal in *Brintley* v. *Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours* I and *Sours* II. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they should prevent lower courts from coming to contrary conclusions or identical issues. *Mandel* v. *Bradley, supra.* It is clear that the Missouri Supreme Court in *Sours* II has come to a conclusion contrary to that reached by this Court in *Brintley* v. *Michigan, supra.* The Michigan statute, which appears in Appendix C, is remarkably similar to the Missouri armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of respondent's conviction for armed criminal action in *Sours* I and II.

This Court has manifested its disapproval of state court expansion of federal constitutional rights as evidenced by this Court's opinion rendered in *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citation omitted]. But, of course, a state

> may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.

Id., 420 U.S. at 719. See also *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

Petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen* v. *United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen*, that:

> In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide.

Whalen v. *United States*, 100 S.Ct. at 1436. (Emphasis added). It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty of them, resides *wholly* with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty.

Whalen v. *United States,* 100 S.Ct. 1436-1437 [Citations and footnote omitted.] [Emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* state that:

> We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress.

Whalen v. *United States,* 100 S.Ct. at ____ [Emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent opinion in *Illinois* v. *Vitale,* 27 Crim.L.Rep. 3190, wherein the test is characterized as follows:

> In *Brown* v. *Ohio,* 432 U.S. 161 (1977), we stated the principal test for determining whether two effenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), which in turn relied on *Gavieres* v. *United States,* 220 U.S. 338, 342-343 (1911), we held that
>
> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct

> statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

Illinois v. *Vitale, supra.*

Petitioner submits that a definitive decision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appears to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have found that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), because it was held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State* v. *Saxen,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to this Court's decision in *Brintley* v. *Michigan*); *Jones* v. *Commonwealth of Virginia,* 235 S.E.2d 313 (1977); *United States* v. *Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from other jurisdictions which it felt supported its view that the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State* v. *Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson* v. *State,*

386 N.E.2d 1185, 1193 (Ind. 1979); *State* v. *Frye*, 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State*, 573 S.W.2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause. In *Whack* v. *State*, 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (highest state court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment prohibition against double jeopardy. Conversely, the Supreme Court of Delaware, in *Hunter* v. *Delaware*, No. 215 (March 15, 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the first degree and the separate crime of possession of a deadly weapon during the commission of a felony.

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours* II: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court [sic] that they believed that as many as four-hundred to six-hundred prior convictions might be affected by the opinion." *Sours* II, *slip opinion* at 12.

Every jurisdiction in this country is anxiously awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been determined and no further state grounds remain in the case. Finally, a decision is necessary because there exist decisions of this Court conflicting with the Missouri Supreme Court's decision in *Sours* II. Therefore, it is respectfully requested

that this Court issue the writs and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the Petition for Writs of Certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

APPENDIX A

IN THE

SUPREME COURT OF MISSOURI

DIVISION TWO

STATE OF MISSOURI, *Respondent,* v. DONALD GREER, *Appellant.*	**No. 61548**

DUPLICATE OF FILING ON SEPT. 9, 1980,
IN OFFICE OF CLERK SUPREME COURT

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY

THE HONORABLE GENE R. MARTIN, JUDGE

Appellant, Donald R. Greer, was charged by indictment in two counts with murder in the second degree and armed criminal action. He was found guilty by a jury which fixed the punishment at life imprisonment for each offense. The trial court imposed sentences pursuant to the jury verdict and directed that the two sentences run concurrently.

Appellant does not challenge the sufficiency of the evidence as to either count, and we need not relate in detail the facts. It is sufficient to state that a jury reasonably could find from the evidence offered by the State that on February 6, 1978 appellant shot and killed Calvin Sandridge.

By his first point appellant asserts that it was error for the trial court to permit the trial to proceed over his objection when there was no record made of the proceedings of the grand jury which indicted him. It is admitted that in this case there was no record made of the proceedings before the grand jury pertaining to appellant, and that it is the practice in Jackson County not to make a record of grand jury proceedings. Appellant further asserts that he was thereby denied due process and equal protection of law. He points out if he had been charged by information with having committed a homicide a preliminary hearing would have been required at which the evidence given by the several witnesses would have been reduced to writing, § 544.370 RSMo 1978, and would have been available to him to be used at trial to cross-examine those witnesses who testified at the preliminary hearing. § 544.390 RSMo 1978.

In some states by court rule, McMahon v. Office of City and County of Honolulu, 51 Haw. 568, 465 P.2d 549 (1970); People v. Duncan, 388 Mich. 489, 201 N.W.2d 629 (1972), or by statute, Seim v. State, 95 Nev. 89, 590 P.2d 1152 (1979), the recording of testimony before a grand jury is mandated. However, there is no requirement in this state that the proceedings before a grand jury must be recorded in every case. State ex rel Dunlap v. Hanna, 561 S.W.2d 411 (Mo. App. 1978); State v. Shives, 601 S.W.2d 22 (Mo. App. 1980). Section 540.105 RSMo 1978, gives to the circuit court the discretion to direct that the testimony before a grand jury in a particular case be transcribed, and § 56.190 RSMo 1978, gives the same discretion to the prosecuting attorney in counties of Class One. Appellant does not attempt to demonstrate that because of the nature of this case the failure to direct that the testimony be transcribed constituted an abuse of discretion. As stated in State v. Delgado, 161 Conn. 536, 290 A.2d 338

(1971), it is the general practice in most states not to require a stenographic record of grand jury proceedings, and it is not required under the Federal Rules of Criminal Procedure. United States v. Caruso, 358 F.2d 184 (2nd Cir. 1966). See United States v. Schrenzel, 462 F.2d 765 (8th Cir. 1972) in which it was held that there is no constitutional requirement that a grand jury record its proceedings. See also United States v. Biondo, 483 F.2d 635 (8th Cir. 1973) cert. den. 415 U.S. 947, 945, Ct. 1468, 39 L.Ed 563.

The failure to transcribe the grand jury proceedings pertaining to the charges against appellant did not violate any statute, rule, or constitutional mandate.

In support of his contention that he was denied equal protection of law appellant asserts that if he had been charged by information he would have been entitled to have counsel present at the preliminary hearing to determine probable cause, and that a transcript of the hearing would have been made which would have been available to him for use at his trial. He contends that these rights were arbitrarily cut off when the prosecuting attorney initiated the prosecution by grand jury indictment.

Mo. Const. Art. I, § 17 provides: 'That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, * * *.'' *.'' The indictment-information procedure does not violate any of appellant's rights under the Missouri Constitution because that is the source of the procedure. See also Beeman v. State, 502 S.W.2d 254 (Mo. 1973); State v. Martin, 395 S.W.2d 97 (Mo. 1965); and State v. Cooper, 344 S.W.2d 72 (Mo. 1961). Therefore, if there is merit to appellant's assertion that he was denied equal protection of law, it must be by reason of the equal protection of law clause in the Fourteenth Amendment of the Constitution of the United States.

Missouri by its Constitution has provided two completely different and alternative methods of initiating a criminal proceeding. One method is by indictment returned by a grand jury. Prior to the adoption of the Constitution of 1875 no person could be prosecuted for an indictable offense except by an indictment returned by a grand jury. Art. III, § 14 Mo. Const. 1820. This was changed by Art. II, § 12, Const. 1875 to permit prosecution by information as well as by indictment.

The grand jury is of ancient origin, and, in general terms, its purpose is to inquire into the commission of crimes, and to return indictments when it determines that a crime has been committed and that there is probable cause to believe that it was committed by the indicted person. One of its purposes is to insure against arbitrary prosecution and to protect citizens against unfounded accusations, Conway v. Quinn, 168 S.W.2d 445 (Mo. App. 1942), or as stated in Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 817, 95 L.Ed. 1118 (1951), "to stand between the prosecutor and the accused." Generally, the proceedings of a grand jury are secret except as specifically modified by statute, State v. McDonald, 342 Mo. 998, 119 S.W.2d 286 (1938), and the accused has no absolute right to appear before the grand jury or to have his counsel present. United States v. Smith, 552 F.2d 257 (8th Cir. 1977).

The alternate method of initiating a criminal proceeding is by information. Any person having knowledge of the commission of a crime may make his affidavit and file it with the Clerk of the Court having jurisdiction of the offense, or he may deposit it with the prosecuting attorney, who in a reasonable exercise of discretion may determine whether the complaint warrants prosecution. State ex rel Schultz v. Harper, 573 S.W.2d 427 (Mo. App. 1978). A preliminary hearing before a judge is required which the accused is entitled to attend, introduce evidence in his be-

half, and cross-examine witnesses against him. If from the evidence introduced at the preliminary hearing it appears to the judge that there is probable cause to believe that a felony has been committed and that the defendant has committed it, Rule 22.07(c), an information may be filed by the prosecuting attorney, and the proceedings thereafter are the same as when an indictment is returned by a grand jury. The purpose of the preliminary hearing is to prevent unreasonable or arbitrary prosecutions, and to have an independent judicial determination of the issue of probable cause.

The procedures are not intended to be identical, and the differences are based on the fundamental nature of the two independent methods of initiating a criminal proceeding.

The purpose of the equal protection clause of the Fourteenth Amendment to the United States Constitution is to prohibit class legislation which discriminates against some citizens and favors others. But, the Missouri indictment-information procedure does not define a class to which one or the other alternate procedures is applicable to the exclusion of the other. There is no class created which is favored under the law over another. Inequality arising from permissible discretion in the administration of a law does not result in a violation of the equal protection of law clause of the Federal Constitution. This issue was considered at length in San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 17, 94 S.Ct. 1278, 36 L.Ed. 16 (1973). There a challenge was made to the Texas system of financing public education. The Supreme Court first stated that it was necessary to decide whether the Texas system "operates to the disadvantage of some suspect class or infringes upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." It was held that the system did

not, and in the case now before us it is clear that the Missouri indictment-information procedure does not purport to operate to the disadvantage of some "suspect class" or infringe upon a fundamental right protected by the Constitution. An accused has no constitutional right to be charged with a crime only by information. The United States Supreme Court then held that there was no evidence that the administration of the Texas system discriminated against any definable category of people, or that it resulted in absolute deprivation of education as to any definable group. In the pending case, there is no definable group that may be charged only by indictment or only by information.

The fact that a prosecutor can exercise some discretion as to whether to proceed by information or present evidence to a grand jury for its consideration does not result in a violation of the equal protection clause. We do not have before us the situation where the State has deliberately and intentionally resorted to the indictment procedure as to all persons of a certain race or some other definable class to the exclusion of others. Without a purposeful classification in the enforcement procedure or the administration of the law, there can be no denial of equal protection of the laws. For example, in Missouri and in most other states the prosecutor is vested with discretion whether to invoke the habitual criminal provisions. In Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962), it was held that defendants' prosecution under the habitual criminal statutes of West Virginia did not violate the Federal equal protection of laws clause even though in the exercise of discretion the State had applied the law to only a minority of those subject to its provisions. The Court stated: "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." See Taylor v. State, 423 P.2d 473, 474 (Okla. Crim.

App. 1967) in which it was held that "The Oklahoma habitual criminal statute applies equally and impartially to all persons charged under it, and the fact that indictments or informations do not always charge violation of such statute where accused has had prior felony convictions, does not invalidate [the] statute as denying equal protection of the laws." See also State v. Sheppard, 371 So.2d 1135 (La. 1979), where the grant of discretion to try a minor for manslaughter as an adult did not result in a denial of equal protection of the laws, and People v. Lawrence, 26 Ill. App.3d 685, 325 N.E.2d 363 (1975), where the exercise of discretion not to treat a 17-year old accused as a minor did not result in a violation of equal protection of the law.

Prior decisions in this State have not specifically addressed the issue presented here, but it was stated in Beeman v. State, supra. at p. 255, that "The provision of Mo. Const. Art. I, § 17, V.A.M.S., authorizing persons to be prosecuted for felony by indictment *or information*, which specifically states that these are concurrent remedies, 'is not violative of the due process and equal protection of the laws clauses of the Federal Constitution, Amend. 14,' " citing State v. Cooper, 344 S.W.2d 72 (Mo. 1961); State v. Jones, 168 Mo. 398, 68 S.W. 566 (1902); Lyle v. Eidson, 182 F.2d 344, (8th Cir. 1950); and Hurtado v. California, 110 516, 4 S.Ct. 111, 28 L.Ed 232 (1884). In other jurisdictions the issue has been specifically presented in several cases, and in no case has it been ruled that a procedure comparable to that in this State violates the equal protection clause of the Federal Constitution. See State v. Cousino, 18 Ariz. App. 158, 500 P.2d 1146 (1972); State v. Hinkle, 26 Ariz. App. 561, 550 P.2d 115 (1979); Burke v. Superior Court in and for County of Pima, 3 Ariz. App. 576, 416 P.2d 997 (1966); State v. Kanistanaux, 68 W.2d 652, 414 P.2d 784 (1966); State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975); People v. Franklin, 80 Ill. App. 128, 398 N.E.2d 1071

(1980); Seim v. State, supra; Gasaway v. Page, 448 P.2d 284 (Okla. Crim. App. 1968); Falgout v. People, 170 Col. 32, 459 P.2d 572 (1969); Chung v. Ogata, 53 Haw. 395, 495 P.2d 26 (1972); Commonwealth v. Morris, 406 A.2d 1091 (Pa. Super 1979); State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695 (1969).

The law pertaining to grand jury proceedings apply equally to all who are indicted by a grand jury, and the fact that appellant was charged by a grand jury instead of way of an information did not result in a denial of the equal protection of law under either the Missouri or Federal Constitution.

Appellant also challenges the validity of his conviction of the offense of armed criminal action which admittedly arose out of the occurrence which constituted murder second degree. This contention must be sustained. Sours v. State, ____S.W.2d____(Mo. banc Aug. 18, 1980).

That part of the judgment pertaining to second degree murder is affirmed; that part pertaining to armed criminal action is reversed and the sentence vacated.

ALDEN A. STOCKARD, COMMISSIONER

PER CURIAM: The foregoing opinion by Stockard, C., is adopted as the opinion of the court. All of the judges concur.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

RECEIVED
OCT 16 1980
ATTORNEY GENERAL'S OFFICE

October 15, 1980

The Hon. John Ashcroft
Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

Mr. Philip H. Schwarz
1125 Grand - Ste. 1510
Kansas City, Missouri 64106

In re: State of Missouri vs. Donald Greer
Supreme Court No. 61548

Dear General Ashcroft and Mr. Schwarz:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's motion for rehearing overruled."

"Appellant's motion for rehearing overruled."

Very truly yours,

Thomas Simon

Clerk.

IN THE

SUPREME COURT OF MISSOURI

DIVISION II

STATE OF MISSOURI, *Respondent,* v. TOMMY BRYANT KENDRICK, *Appellant.*	**No. 61936**

DUPLICATE OF FILING ON OCT. 15, 1980,
IN OFFICE OF CLERK SUPREME COURT

APPEAL FROM THE CIRCUIT COURT OF
JASPER COUNTY

THE HONORABLE HERBERT C. CASTEEL, JUDGE

Appellant was charged by indictment with four counts of robbery in the first degree by means of a dangerous and deadly weapon, and with four counts of armed criminal action, each based on the use of a dangerous instrument or deadly weapon in the commission of one of the charged robberies. Trial before a jury was had on Count V (armed robbery) and Count VI (armed criminal action), and after a finding of guilty as to each count, appellant was sentenced to imprisonment for thirty years for robbery and to life imprisonment for armed criminal action, the sentences to be served concurrently. Thereafter, appellant entered a plea of guilty to each of the remaining three counts of robbery, and was sentenced to imprisonment for thirty years on each count to be served concurrently. As to the remaining three counts of armed criminal action, ap-

pellant waived jury trial, entered into a stipulation of facts pertaining to each, and was found guilty by the trial court and sentenced to concurrent life imprisonment on each count.

The notice of appeal was from the judgment entered on Count V (robbery in the first degree), and on Counts II, IV, VI and VIII (each based on armed criminal action). However, there is no point in appellant's brief pertaining to the judgment entered on Count V, and the appeal as to that count is abandoned. State v. Sykes, 436 S.W.2d 32 (Mo. 1969); State v. Reese, 364 Mo. 1221, 274 S.W.2d 304 (banc 1954).

Appellant's challenge to the judgment entered on the counts charging the offense of armed criminal action must be sustained. Sours v. State, 593 S.W.2d 208 (Mo. banc 1980); vacated, Missouri v. Sours, ____ U.S. ____S.Ct. ____, 64 L.Ed.2d 820 (1980); on remand, Sours v. State, ____S.W.2d____(Mo. banc No. 61458, August 18, 1980).

The judgment of conviction on Count V for robbery in the first degree is affirmed. The judgment on conviction on Counts II, IV, VI and VIII (each based on armed criminal action) is reversed.

ALDEN A. STOCKARD, COMMISSIONER

PER CURIAM: The foregoing opinion by Stockard, C., is adopted as the opinion of the Court. All of the Judges concur.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

November 12, 1980

The Hon. John Ashcroft
Attorney General
Box 899
Jefferson City, Missouri 65102

In re: State of Missouri vs. Tommy Bryant Kendrick
Supreme Court No. 61936

Dear General Ashcroft:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

Thomas F. Simon

Clerk.

cc: Mr. David Robards

IN THE

SUPREME COURT OF MISSOURI

DIVISION I

STATE OF MISSOURI, *Respondent,* vs. ROLLAN ANTHONY WILLIAMS, *Appellant.*	**No. 61595**

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

HONORABLE PHILIP SWEENEY, JUDGE

A jury in the St. Louis County Circuit Court found Rollan Anthony Williams guilty on two counts of robbery in the first degree and two counts of armed criminal action. The court, acting under the Second Offender Act, sentenced the defendant to life imprisonment on each of the four counts, the sentences to run concurrently. This appeal followed.

The state's evidence showed that, on April 28, 1978, at around 6:45 P.M., Williams entered Hartwig's Tavern in Creve Coeur, St. Louis County, took a seat at the bar and was served a bottle of Budweiser beer. A short time later a second person entered the tavern and requested and was served a glass of water at the bar. Williams ordered a second beer and after he had been at the bar for about 15 minutes, he and the man to whom the water had been served pulled pistols and announced a holdup to the bar manager

and other customers. Money belonging to the tavern owner was taken and the billfolds of at least two customers.

On May 18, 1978, Williams was arrested for the robbery and identified at a line-up by the bar manager. The bar manager identified Williams at his trial. Fingerprint technicians found Williams's palm print on one of the beer bottles from which he drank at the tavern.

Williams was charged with robbery in the first degree. One count was directed at the taking of the tavern money, the second at the taking of a customer's wallet and money. A charge of armed criminal action was filed to each of the two robbery counts.

Williams offered two witnesses who testified to an alibi. The jury found the defendant guilty of each of the four counts.

In this Court, appellant complains of the trial court's refusal to allow his attorney to amend his peremptory challenges after he advised the court that he had incorrectly transcribed the strikes from his list to the list given to the bailiff. Appellant complains that the court's ruling denied appellant his statutory right to exercise of his peremptory challenges.

Appellant's brief states that the error involved came to his attention when Venireman McKenna was instructed by the bailiff to take seat No. 2 in the jury box. The brief states that appellant had intended to strike McKenna and that his attorney immediately notified the court of his mistake. However, the transcript which must be the basis for this Court's review shows that 12 jurors and one alternate were seated and that defense counsel thereafter advised the court of his error, that he had intended to strike McKenna and "* * * that because of the error on my part I didn't write it down on my list and consequently I strike an extra person." He requested leave of court to

amend his strike to remove McKenna and to take off one of the strikes he had given the bailiff. The court overruled the request.

A request to permit amendment of peremptory strikes before a jury is sworn is addressed to the trial court's discretion. State v. Brown, 554 S.W.2d 574, 578[7] (Mo. App. 1977); State v. Blankenship, 536 S.W.2d 520, 521-522[7] (Mo. App. 1976); State v. Harris, 356 S.W.2d 889, 890-891[2] (Mo. 1962).

Appellant has shown no abuse of discretion in this situation. Although the record indicates that the jurors not selected had not been excused, contrary to the situation in *Harris,* the trial court's ruling is not for that reason an abuse of discretion. In view of the timing of the request as shown by the transcript, the trial court might well have felt that a change at that juncture would have presented problems. Appellant's complaint is that the trial court's action denied him the right to make his peremptory challenges as he saw fit. However, he acknowledges that he can demonstrate no prejudice as a result of the court's ruling. He acknowledges that there was no basis for a challenge for cause against McKenna and relies upon a feeling, based on voir dire, that McKenna would not be a favorable juror. Appellant's cases involving the seating of a juror who should have been disqualified for cause are not in point.

No abuse of discretion and no prejudice having been demonstrated, this claim of error is rejected.

Appellant complains of the trial court's denial of his request for a mistrial because a police officer testified that a woman (presumably the tavern manager) picked appellant out of a line-up. Objection to the testimony was promptly sustained and the jury instructed to disregard it but the request for a mistrial was denied. Appellant con-

tends that State v. DeGraffenried, 477 S.W.2d 57 (Mo. 1972), and State v. Johnson, 538 S.W.2d 73 (Mo. App. 1976), required a mistrial because of this testimony.

Johnson applied the *DeGraffenried* test for determining the prejudicial effect of the erroneous admission of testimony. The question here is whether *Degraffenried* required a declaration of a mistrial because the testimony had been heard by the jury.

Degraffenried is distinguishable because the objection was overruled to the police officer's testimony regarding a state's eyewitness's line-up identification of the defendant. Although under *Degraffenried* the fact that the eyewitness herself had previously testified to her line-up identification of the defendant would not necessarily have rendered the officer's testimony harmless error had it been allowed to stand, over objection, the trial court could properly take that fact into consideration in determining the corrective measure called for. Given the drastic nature of the remedy of a mistrial, *DeGraffenried* does not require a mistrial on every case where such testimony slips into a trial. A proper exercise of discretion is still allowed insofar as declaring a mistrial is concerned and the trial court here did not abuse its discretion. See State v. Brown, 528 S.W.2d 503, 506[7] (Mo. App. 1975); State v. Washington, 549 S.W.2d 547-549[3] (Mo. App. 1977).

Appellant contends that he was unconstitutionally penalized for exercising his right to a jury trial in that the court, on the state's recommendation, imposed four life sentences, whereas the state, prior to trial, had offered a sentence of four 15-year terms in return for a plea of guilty. Appellant relies upon People v. Dennis, 28 Ill. App.3d 74, 328 N.E.2d 135 (1975), as closely paral-

lelling his case. In *Dennis*, in pretrial plea bargaining, participated in by the court with full knowledge of the defendant's past record and the state's pending case, the court had stated its willingness to accept the state's recommendation of a two to six-year sentence in return for a guilty plea. The defendant rejected that offer and when found guilty on a jury trial, the court, following the state's recommendation, imposed a 40 to 80-year sentence. Upon post-conviction review, the court upheld the defendant's contention that the heavier sentence had been imposed for the defendant's exercise of his right to jury trial. The court noted the absence of anything in the record to justify the heavy sentence imposed.

The distinguishing feature between that case and this is the judge's participation in the plea bargaining in *Dennis*. In this case, the trial judge was not a party to the plea bargaining. The fact that his sentences coincided with the state's recommendation does not charge him with responsibility for or approval of the pre-trial offer. *Dennis* recognizes the distinction between this situation and that presented in *Dennis* and notes that " * * * a mere disparity between the sentence offered during plea bargaining and that ultimately imposed, of itself, * * * " does not provide a basis for relief. 328 N.E.2d 138[5].

Appellant has not demonstrated that the trial court's sentence was retaliatory for the defendant's exercise of his right to trial by jury. State v. Volner, 569 S.W.2d 781 (Mo. App. 1978).

Under Sours v. State, 593 S.W.2d 208 (Mo. banc 1980); vacated, Missouri v. Sours, ____ U.S. ____, 64 L.Ed.2d 820 (1980); on remand, Sours v. State, ____ S.W.2d ____ (Mo. banc No. 61458, August 18, 1980), the convictions for armed criminal action cannot stand.

Judgment affirmed as to Counts I and III; reversed as to Counts II and IV.

Robert R. Welborn, Commissioner

Morgan, J., concurs; Donnelly, J., concurs in separate concurring opinion filed; Rendlen, P.J., concurs in result.

IN THE

SUPREME COURT OF MISSOURI

DIVISION I

STATE OF MISSOURI, *Respondent,* vs. ROLLAN ANTHONY WILLIAMS, *Appellant.*	**No. 61595**

CONCURRING OPINION

Few would contend that the position of the United States Supreme Court, reference the National Double Jeopardy Clause, is presently coherent. *See* Westen and Drubel, *Toward a General Theory of Double Jeopardy; 1978 The Supreme Court Review* 81 (Chicago: The Univ. of Chicago Press, 1979).

In this circumstance, the attempt of the majority in Sours v. State, ____ S.W.2d ____ (Mo. banc No. 61458, August 18, 1980) to follow the twists and turns of the United States Supreme Court in this area of the law is almost masochistic. In North Carolina v. Butler, 441 U.S. 369, 376 (1979) the Court stated that it will "accept whatever construction of a state constitution is placed upon it by the highest court of the State."

First, I would disentangle and hold:

(1) That Mo. Const. art. I, § 19 proscribes a second prosecution for the same offense after acquittal.

(2) That to cause a person to be twice prosecuted

for the same offense after conviction is to deprive that person of due process of law. Mo. Const. art. I, § 10.

(3) That to cause a person to be twice punished for the same offense is to deprive that person of due process of law. Mo. Const. art. I, § 10.

Second, I would implement (1) and (2), *supra,* by applying Mr. Justice Brennan's "same transaction" test and require "the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." Ashe v. Swenson, 397 U.S. 436, 453, 454 (1970). (Brennan, J., concurring). *See also* ALI, Model Penal Code, Proposed Official Draft §§ 1.07, 1.08, 1.09 (1962).

Third, I would implement (3), *supra,* by proscribing punishment in excess of what the Missouri General Assembly intended.

I concur under the compulsion of *Sours, supra.*

Robert T. Donnelly, Judge

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
JEFFERSON CITY, MISSOURI
65101

AS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

MAIL
P. O. BOX 150

November 12, 1980

Mr. Michael J. Gorla
111 South Bemiston
Suite 211
Clayton, MO 63105

Mr. Lew A. Kollias
Asst. Attorney General
P.O. Box 899
Jefferson City, MO 65102

In Re: State of Missouri, resp., vs.
Rollan Anthony Williams, app.
Supreme Court No. 61595

Gentlemen:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

Thomas F. Simon

Clerk

APPENDIX B

Section 560.120, RSMo 1969, is as follows:

Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp. is as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 565.004, RSMo 1978, is as follows:

***565.004. Murder in the second degree.**—All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

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Section 559.225, RSMo Supp. 1976, is as follows:

559.225. Armed criminal action—penalty—exceptions. —1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible

for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calender years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

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felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]

Fil May 21 Conf

LAW OFFICES OF
McMULLIN, WILSON AND SCHWARZ
SUITE 1510 TRADER'S BANK BUILDING
12TH AND GRAND AVENUE
KANSAS CITY, MISSOURI 64106

JAMES L. McMULLIN
SLOAN R. WILSON
PHILIP H. SCHWARZ

421-6979
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May 11, 1981

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk, Supreme Court
United States Supreme Court
Washington, D.C. 20543

Attn: Alexander L. Stevas Re: State of Missouri v. Donald Greer, No. 80-997

Dear Mr. Stevas:

This is to notify the Court that the Respondent Donald Greer has read the briefs of Respondent Tommy Bryant Kendrick and Rollan Anthony Williams, both filed in opposition to the granting of the Petition for Writ of Certiorari. The Respondent Donald Greer believes that he has and can offer nothing further by way of argument and authorities, to supplement those briefs and he respectfully requests that his case be taken up and decided by the Court on the strength of the arguments and authorities already before it, as contained in the briefs already filed with the Court.

Respondent Greer encloses an Application to proceed in forma paupris in this cause.

Very truly yours,

Philip H. Schwarz

PHS:mm
CC: Attorney General
State of Missouri

10

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter was mailed to the office of the Attorney General of the State of Missouri, John D. Ashcroft, Supreme Court Building, Jefferson City, Missouri 65101, this 11th day of May, 1981.

PHILIP H. SCHWARZ, #18809
MCMULLIN, WILSON & SCHWARZ
1125 Grand Avenue, Suite 1510
Kansas City, MO 64106
816/421-6979
Attorney for Respondent

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-997

STATE OF MISSOURI,

Petitioner

vs.

DONALD GREER, et al,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPRIS

AND FOR APPOINTMENT OF COUNSEL

PHILIP H. SCHWARZ, No. 18809

MCMULLIN, WILSON & SCHWARZ
1125 Grand Avenue, Suite 1510
Kansas City, Missouri 64106
816/421-6979

Attorney for Respondent Greer

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-997

STATE OF MISSOURI,

Petitioner,

vs.

DONALD GREER, et al,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPRIS AND FOR APPOINTMENT OF COUNSEL

Respondent Donald Greer is now in custody of the State of Missouri at the Missouri State Penitentiary in Jefferson City, Missouri pursuant to a judgment and sentence of guilty of murder in the second degree. The Petitioner is serving life sentence pursuant to the judgment. In the above-captioned case, Respondent was found to be indigent during his direct appeal to the Supreme Court of Missouri following his conviction. Respondent, as far as counsel knows, has no financial means with which to retain an attorney for the purpose of this action, and has no property of any kind. He is soley dependant on the State of Missouri for his support at the present. Respondent, pursuant to Rule 53 of the Supreme Court of the United States,

seeks leave to proceed in forma paupris in this Court, and for the appointment of counsel, pursuant to United States Supreme Court Rule 53(8).

Counsel for Respondent states that he is a member of the bar of the Supreme Court of the United States, having been admitted on the 23rd of February, 1981, upon the motion of Sloan R. Wilson, of the Supreme Court Bar.

Respectfully submitted,

PHILIP H. SCHWARZ, #18809
McMULLIN, WILSON & SCHWARZ
1125 Grand Avenue, Suite 1510
Kansas City, Missouri 64106
816/421-6979

Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Motion for Leave to Proceed in Forma Paupris was mailed to the office of the Attorney General of the State of Missouri, John D. Ashcroft, Supreme Court Building, Jefferson City, Missouri 65101, this 12th day of May, 1981.

PHILIP H. SCHWARZ, #18809

Attorney for Petitioner

RECEIVED
MAR 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, Petitioner,

Vs.

No. 80-997

TOMMY BRYANT KENDRICK, Respondent,

MOTION AND SUGGESTIONS

FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, TOMMY BRYANT KENDRICK, by counsel, hereby moves the Court for its order allowing the respondent to proceed in this case in forma pauperis.

As grounds for this motion, the respondent states as follows:

1. On or about December 15, 1980, petitions for writs of certiorari, including a petition with regard to the respondent, were docketed in the above case and assigned the above number.

The last information received by the undersigned counsel was that the respondent Kendrick was incarcerated in a penal institution in the state of Kansas, completing service of a sentence imposed on him in that state, with detainers filed on him by California and Missouri for convictions in those states.

2. On best information and belief, the respondent is unable to pay the costs and expenses required or necessitated in responding to the petition for writ of certiorari and any other subsequent proceedings.

3. The respondent was determined to be an indigent by the courts of the State of Missouri and was appointed counsel to represent him and allow to proceed in forma pauperis in connection with all proceedings before the courts of that state.

4. On best information and belief and from personal observation, the respondent is not learned in the law and is unable to personally prepare a response to the petition for writ of certiorari or to represent himself in any subsequent proceedings.

5. The undersigned is attempting to obtain an affidavit of poverty from the respondent to file in support of this motion and if the undersigned is able to obtain such and affidavit will immediately forward it to this court.

WHEREFORE, the respondent prays that the court allow him to proceed in forma pauperis and to grant him such other relief as is deemed necessary and proper.

Respectfully submitted,

David Robards. pch

DAVID ROBARDS
PUBLIC DEFENDER

201 JASPER COUNTY COURTS BUILDING
SIXTH AND PEARL STREETS
JOPLIN, MISSOURI 64801
(417) 781-4114

ATTORNEY FOR RESPONDENT

I hereby certify that a true and correct copy of the foregoing was hand-delivered this _____ day of March, 1981 to: Paul R. Otto, Chief Counsel, Criminal Division, Attorney General's Office, Jefferson City, Missouri.

Paula Howell

AFFIDAVIT

I, David Robards, upon my oath, hereby state as follows:

1. I am the duly appointed public defender for the 29th Judicial Circuit of Missouri which is coextensive with the boundries of the County of Jasper, Missouri.

2. My office was appointed to represent the respondent during all proceedings before the courts of the State of Missouri after the respondent was found to be unable to afford counsel or pay other costs and expenses.

3. On best information and belief and from personal observation, the respondent is not learned in the law and is unable to represent himself in connection with this case.

4. On best information and belief, the respondent is presently incarcerated in a state institution either in Kansas, California or Missouri.

These things are true and correct and further the affiance saith not.

David Robards

DAVID ROBARDS

Subscribed and sworn to before me this ____ day of March, 1981.

Paula Howell

Paula Howell, Notary Public

My commission expires: April 27, 1984.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,	Petitioner,)	
Vs.	)	No. 80-997
TOMMY BRYAND KENDRICK,	Respondent,)	

AFFIDAVIT OF RESPONDENT

The respondent, TOMMY BRYAND KENDRICK, upon his oath, hereby states the following:

1. I am presently incarcerated within the Kansas Department of Corrections and am withouth funds to pay for the costs and expenses involved in the is case.

2. I was granted leave to proceed as a poor person by the State of Missouri with regard to the case for which a writ of certiorari is sought.

3. I am not learned in the law and am unable to represent myself in this action.

I swear that the above things are true and correct.

Tommy B. Kendrick
TOMMY BRYANT KENDRICK

Subscribed and sworn to before me this 17th day of March, 1981.

WILLIAM L. SHODGRASS
Leavenworth County, Ks.
My Appt. Exp. 1-22-87

Notary Public

My commission expires: 3-26-83.

RECEIVED
MAR 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-997

STATE OF MISSOURI,

Petitioner

Vs.

TOMMY BRYANT KENDRICK, AET AL

Respondent

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

DAVID ROBARDS
PUBLIC DEFENDER

201 JASPER COUNTY COURTS BUILDING
SIXTH AND PEARL STREETS
JOPLIN, MISSOURI 64801
(417) 781-4114

ATTORNEY FOR RESPONDENT

TABLE OF AUTHORITIES

Blockburger v. United States, 284 U.S. 299 (1932);

Brinkley v. Michigan, _____ U.S. _____ (1979);

Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976);

Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978);

Garner v. Louisiana, 368 U.S. 157 (1961);

Harris v. Oklahoma, 433 U.S. 682 (1977);

Hunter v. State, 420 A.2d 119 (Del.Supr. 1980);

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973);

Missouri v. Sours, _____ U.S. _____ (1981);

Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972);

North Carolina v. Rice, 404 U.S. 244 (1971);

O'Brien v. Skinner, 414 U.S. 524 (1973);

Sours v. State,593 S.W.2d 208 (Mo.Banc 1980);

Sours v. State, 603 S.W.2d 592 (Mo.Banc 1980);

State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973);

State v. Frey, 459 S.W.2d 359 (Mo. 1970);

State v. Kendrick, 606 S.W.2d 643 (Mo. 1980) (advance sheet)

United States v. DiFrancesco, 66 L.Ed.2d 328 (1980);

Wayne County Prosecutor v. Recroder's Court Judge, 406 Mich. 280 N.W.2d 794 (1979);

Whalen v. United States, 445 U.S. _____ 1980;

STATUTES CITED

Mo.Rev.Stat.Sec. 559.225

Mo.Rev.Stat.Sec. 571.015

Mo.Rev.Stat.Sec. 560.120

Mo.Rev.Stat.Sec. 556.041

Mo.Rev.Stat.Sec. 556.046

CONSTITUTIONAL PROVISION CITED

United States Constitution, Fifth Amendment

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 80-997

STATE OF MISSOURI

Petitioner,

Vs.

TOMMY BRYANT KENDRICK, AET AL

Respondent,

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The respondent, TOMMY BRYANT KENDRICK, in opposition to the granting of the petition for writ of certiorari in this case, states as follows:

OPINION BELOW

The opinion of the Missouri Supreme Court in this case is reproduced by the petitioner in its Apendix A to the petition and is before this Court. It also has been reported in the advance sheets to the Southwestern Reporter, State v. Kendrick, 606 S.W.2d 643 (Mo. 1980).

JURISDICTIONAL STATEMENT

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). The petitioner, however, fails to state in its jurisdictional statement what portion of that statute is purportedly applicable in this case. Presumably, however, the petitioner claims that this Court has jurisdiction to review the holding of the Missouri Supreme Court on the basis that "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States." Again presumably, it is the Missouri Supreme Court's holding with regard to the "validity" of Mo.Rev.Stat.Sec. 559.225 (Supp. 1976), the armed criminal action statute, which the petitioner feels provides the jurisdictional basis in this Court. However, it is to be noted that the Missouri Supreme Court has not invalidated Section 559.225 [renumbered effective January 1, 1979 as Mo.Rev.Stat.Sec. 571.015 (1979)] and prosecutions under that section are still authorized. Under these circumstances, the jurisdictional statement of the petitioner is inadequate to merit review by this Court.

QUESTIONS PRESENTED

1. Whether this case presents an issue in a manner that warrants the exercise of the certiorari jurisdiction of this Court?

2. Whether imposing separate punishments in a single state proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of that felony violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, where the highest court of that state has held the state legislature intended to separately punish both offenses but that the two offenses are in law and fact the same offense?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, in per-

tinent part, reads as follows:

> "No person shall . . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

The statutes defining the underlying felony, armed robbery, Mo.Rev.Stat.Secs. 560.120 (1969) and 560.135 (Supp. 1975), and the armed criminal action statute, Mo.Rev.Stat.Sec. 559.225 (Supp. 1976), have been reproduced by the Missouri Supreme Court in its opinions in State v. Sours, 593 S.W.2d 208, 213-14 (Mo.Banc 1980) and 603 S.W.2d 592, 597-98, n. 5 and 6 (Mo.Banc 1980), both of which figure prominently in this case. The petitioner has also reproduced these statutes in its Appendix C to the petition.

Mo.Rev.Stat.Sec. 556.041 (1978), effective January 1, 1979, provides as follows:

> "When the same conduct of a person may establish the commision of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046; or
>
> (2) Inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
>
> (4) The offense is defined as a continuing course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Mo.Rev.Stat.Sec. 556.046 (1978), effective January 1, 1979, provides as follows:

> "1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
>
> (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.
>
> 2. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him or the included offense."

STATEMENT OF THE CASE

The indictment, filed in the state trial court on November 21, 1979, was in eight counts. The odd-numbered counts alleged the respondent had committed four armed robbery offenses and the even-numbered counts alleged that he had in addition committed four armed criminal action offenses, each of the latter offenses referring to the armed robbery described in the previous count. On December 19, 1979, the respondent was brought to trial on Counts V and VI, the former an armed robbery charge for the robbery of the Safeway store at 4th and Grey in Joplin, Missouri on November 22, 1977 and the latter for armed criminal action relating to the same armed robbery. The trial was completed that day when the jury returned its verdicts finding the respondent guilty of armed robbery and assessing punishment at thirty years and finding him guilty of armed criminal action and assessing punishment at life. On January 2, 1980, the respondent was sentenced in accordance with these verdicts, the sentences running concurrently.

On that same date, January 2, 1980, the respondent pled guilty to the three charges of armed robbery contained in Counts I, III and VII and was sentenced to thirty years on each count. After the pleas of guilty on these counts were accepted, with regard to Counts II, IV and VIII, all derivative armed criminal action charges, the respondent waived trial by jury and stipulated that he was guilty of the robbery charges in Counts I, III and VII and that he had committed those robberies with or through the use, assistance or aid of a dangerous and deadly weapon. Whereupon, the respondent was found guilty by the trial court of armed criminal action as alleged in Counts II, IV and VIII. The respondent was then given three thirty year sentences on the armed robbery convictions and three life sentences on the armed criminal action convictions all of which were made to run concurrently with each other and with the previous sentences imposed on Counts V and VI.

On appeal, the Missouri Supreme Court reversed all four armed criminal action convictions relying upon its opinions in the Sours cases. 606 S.W.2d at 644.

Thereafter, on or about December 15, 1980, the state filed its petition

for writ of certiorari.

REASONS FOR DENYING THE WRIT

1. This case does not present a double jeopardy issue in a manner that warrants the exercise of the certiorari jurisdiction of this Court.

The armed criminal action statute which lies at the very heart of any controversy in this case was renumbered Mo.Rev.Stat.Sec. 571.015 (1978) at the time of the enactment of the new Missouri Criminal Code which was effective on January 1, 1979. Enacted with that code were two new statutes, Mo.Rev.Stat.Secs. 556.041 and .046 (1978), the combined effect of which is to preclude multiple convictions, and consequently multiple punishments, where one offense is included in or a lesser included offense of another. One of the material issues decided by the Missouri Supreme Court in the combined Sours v. State cases was that it was the intent of the Missouri General Assembly, the term used to describe the combined houses, Senate and Legislature, of the legislative branch of the state, to punish separately armed criminal action and the underlying felony. However, that court in the Sours cases also decided that the underlying felony was either an included or lesser included offense of armed criminal action. Insofar as the undersigned is aware, the Missouri Supreme Court has not had to decide as yet whether the legislative intent to limit convictions (and consequently punishments) as contained in Sections 556.041 and .046 overrides the legislative intent to proliferate convictions and punishments as expressed in the armed criminal action statute. Obviously, the Missouri Supreme Court may hold that the legislative intent of Sections 556.041 and .046 overrides the legislative intent of the armed criminal action statute and, if so, prosecutions under the armed criminal action statute for offenses occurring after the effective date of the new Code, January 1, 1979, will not present any double jeopardy issue under the Fifth Amendment. Under these circumstances, this case does not present an issue in a manner that warrants the exercise of certiorari jurisdiction by this Court. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

2. The Double Jeopardy Clause of the Fifth Amendment prohibits imposing separate punishments for two offenses which are in law and fact the same offense even though the punishments are imposed as a result of a single proceeding and even though the legislative intent was that a separate punishment be imposed.

The petition for writ of certiorari filed by the state questions the validity of reversing the respondent's convictions on the even-numbered counts in this case on federal constitutional double jeopardy grounds. It is clear, however, from the facts of the case that regardless of the reasoning, the state supreme court was correct in reversing the convictions on Counts II, IV and VIII. The respondent had previously been convicted of the corresponding armed robberies in Counts I, III and VII by pleading guilty to those counts. Thereafter he was court-tried on Counts II, IV and VIII on the basis of a stipulation. Therefore, there clearly were two proceedings involved with regard to those six counts and therefore the convictions on the even-numbered counts cannot stand. Harris v. Oklahoma, 433 U.S. 682 (1977). The question therefore is whether it was a violation of the Fifth Amendment Double Jeopardy Provision to convict the respondent of Counts V and VI.

In this case with regard to Counts V and VI, there was a single proceeding as a result of which the respondent received multiple punishments for armed robbery and armed criminal action, the two offenses arising out of but one incident or transaction. The Missouri Supreme Court has defeinitively decided two issues in the Sours cases which this Court may not disturb:

1. It was the intent of the Missouri General Assembly that separate and multiple punishments be imposed for armed criminal action and the underlying felony.

2. Every element of the underlying felony is included in Armed Criminal Action; this is, proof of the underlying felony does not requre proof of any additional fact not needed to prove armed criminal action; that is, armed criminal action includes the underlying felony; that is, armed criminal action and the underlying felony are in law and fact the same; and that is, armed

criminal action is the "same offense" as the underlying felony for double jeopardy purposes. E.g., Whalen v. United States, 445 U.S. _____ (1980); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973); O'Brien v. Skinner, 414 U.S. 524 (1973); Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976); Garner v. Louisiana, 368 U.S. 157 (1961).

Assuming that the respondent has adequately stated the two fundamental issues of state law decided by the Missouri Supreme Court in the combined Sours cases, the phraseology used by the petitioner in stating its version of the "questions presented" here and much of the argument for granting the writ is confusing. The constitutional issue is not one involving multiple "convictions" but one involving multiple "punishments." It is true that, after holding that the respondent could not be punished for both armed robbery and armed criminal action, the Missouri Supreme Court vacated and set aside the "convictions" for armed criminal action. However, in this state there can be no "conviction" unless there is an imposition of a sentence of punishment. See State v. Frey, 459 S.W.2d 359 (Mo. 1970); State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973). This rule of Missouri law is important for this Court's study of the Sours cases and Hunter v. State, 420 A.2d 119 (Del.Supr. 1980) (advance sheet). In the latter case, the Delaware Supreme Court was faced with the same multiple punishments-double jeopardy issue contained in this case and its findings on that issue paralleled the findings of the Missouri Supreme Court in the two Sours cases, except that the Delaware Court affirmed the multiple convictions but set aside the multiple sentences. In the respondent's view, the rule of Missouri law noted above is the most likely reason the Missouri Supreme Court did not allow the multiple "convictions" to stand and explains the difference in result in the Hunter case and the Sours cases. It is to be noted that the two state supreme courts reached their decisions independently one from the other and that each court decided that this Court's decision in the Whalen case had not reduced the Fifth Amendment guarantee against multiple punishments to a question of mere legislative intent.

At any rate, the emphasis the petitioner puts on "convictions" in presenting the questions in the case and arguing the case is unwarranted. The

case insofar as Counts V and VI are concerned involves a question of the reach of the Fifth Amendment's guarantee against multiple punishments for the same offense. The framework in which the question must be decided is as follows: (1) the punishments result from offenses which arose out of the same act, incident or transaction; (2) it was the legislature's intent to punish each offense separately; (3) there was but one legal proceeding; and (4) the offenses are in law and fact the same offense. Thus, the constitutional question in that framework is whether the multiple punishments imposed for the two (but same) offenses violate the guarantee against multiple punishments contained in the Double Jeopardy Clause of the Fifth Amendment.

The petitioner claims that this Court has given a definitive answer to this question in Whalen and because of the dismissal for want of a substantial federal question in Brinkley v. Michigan, _____ U.S. _____ (1979). The decision in Whalen, however, is clearly based upon a finding of legislative intent and does not measure the reach of the protection against multiple punishments. The case underlying Brinkley is cited as Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979). In the latter case, the Michigan Supreme Court was constuing a felony firearms statute and the underlying felony, in Brinkley's case armed robbery. The petitioner has reproduced these statutes in its Appendix D to the petition. In essence, at least as is important here, the Michigan court held the felony firearms statute created a separate and distinct crime from the underlying felony so that the two offenses were not the same. As the respondent perceives it, this holding by the Michigan court was conclusive on the issue of whether the two offenses were the same for double jeopardy purposes and therefore this Court, not being free to place a contrary construction on state statutes, could find no substantial federal question. (It is true that if the rule in Blockburger v. United States, 284 U.S. 299 (1932) is one of constitutional dimension and if that rule were to mandate the reasoning of the majority in Whalen v. United States, supra, 63 L.Ed.2d 715, 725, concerning felony murder and the underlying felony, there would clearly have been a substantial federal question in Brinkley. However, Whalen has placed the status of the Blockburger rule

in question and, furthermore, there appears to be no settled precedent that the reasoning of the majority on felony murder and the underlying felony is constitutionally mandated. But see Harris v. Oklahoma, supra. It is to be noted, however, that in this case the holding of the Missouri Supreme Court that armed criminal action and armed robbery are, for double jeopardy purposes, the "same offense" does not concern the status of the Blockburger rule. That holding is based on the state court's construction of state laws. Even if this Court were to disagree with that holding on constitutional grounds, the Court would be unjustified in disturbing the holding as there is no constitutional deprivation resulting from the holding. Thus, the status of the Blockburger rule is not involved in this case.)

In sum, it appears this Court has not definitively addressed the multiple punishments-double jeopardy question in this case. But see Missouri v. Sours, _____ U.S. _____ (1981) with regard to this question, the Missouri Supreme Court has fully reviewed and considered the opinions of this Court. Sours v. State, supra, 593 S.W.2d at 211-14, 218-21 and Sours v. State, supra, 603 S.W.2d at 603-606. Citations to prior opinions of this Court are contained in the thorough analysis of the Missouri court. Also, see Hunter v. State, supra. The respondent can neither improve on nor add to the analysis of the constitutional question made by the Missouri and Delaware courts. In sum, the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States prohibits Missouri from punishing the respondent twice for the same offense. In the framework of this case, armed robbery (Count V) and armed criminal action (Count VII) are the same offense. Therefore, the repondent may not be punished for both offenses. The jurists in Hunter v. State, supra, 420 A.2d at 128 saw the analysis they gave the question as constituting "settled law on the subject of double jeopardy." They present present persuasive arguments as to why multiple punishments should be disallowed.

> "It is argued that the differences between punishment for the same offense via the vehicle of two statutes and enhanced punishments by one statute, which is clearly constitutional, is illusory. We disagree. Punishment for the same offense via two separate statutes does more than merely cumulate punishment for that one offense. It has profound collateral effects on parole considerations, future treatment as an habitual offender, and may lead to harsher sentences for later offenses . . . .
>
> * * * *

"We are of the opinion that the Double Jeopardy Clause was intended to prevent double punishment regardless of the procedural context in which it is found. We can find no sound basis, in Whalen or elsewhere, to exempt the Legislature from adherence to this constitutional doctrine in the instant case. Multiple sentences in the same trial for the same act are equally as abhorrent to the constitutional guarantee, in our view, as multiple sentences for the same act resulting from multiple trials."

Id. at 10.

The Missouri Supreme Court also declined to make any ruling which would free the Missouri General Assembly to "impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test."

"We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant the state legislature the power to define the meaning of 'same offense as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it."

603 S.W.2d at 606.

In fact, if the issue of whether multiple punishments for the same offense can be imposed is reduced to an issue of legislative intent, it may no longer be said that there are three separate constitutional protections in the guarantee against double jeopardy. There would never be need to invoke the third protection, the protection against multiple punishments for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. DiFrancesco, 66 L.Ed.2d 328 (1980).

Because there was only one criminal proceeding in this case, one of the primary objectives of the double jeopardy guarantee - that of prohibiting a second proceeding - is not involved. Surely prohibiting multiple punishments for the same offense is another basic thrust or purpose of that guarantee. Surely, "the prosecution may not do in one trial what is prohibited from doing in two trials." Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978). Here, the state could not convict and punish the respondent for one of the two offenses (Counts V and VI) at one criminal proceeding and then convict and punish

him for the second of the two offenses at the second criminal proceeding. Harris v. Oklahoma, supra. If the state were to be allowed to do in one proceeding what the state may not do in two proceedings, form would be clearly be exalted over substance. It is said that in this area of constitutional law, the "exaltation of form over substance is to be avoided." United States, v. DiFrancesco, supra, 28 Cr.L. at 3025.

So let it be.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

David Robards peh

DAVID ROBARDS
PUBLIC DEFENDER

201 JASPER COUNTY COURTS BUILDING
SIXTH AND PEARL STREETS
JOPLIN, MISSOURI 64801
(417) 781-4114

ATTORNEY FOR RESPONDENT

RECEIVED
APR 13 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI, Petitioner, v. DONALD GREER, Respondent, * STATE OF MISSOURI, Petitioner, v. TOMMY BRYANT KENDRICK, Respondent, * STATE OF MISSOURI, Petitioner, v. ROLLAN ANTHONY WILLIAMS, Respondent.	Cause No. 80-997

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Rollan Anthony Williams, hereinafter referred to as respondent, by and through his attorney, and moves this Court pursuant to 28 U.S.C. § 1915 and Rule 46 of the Supreme Court for leave to proceed in forma pauperis for the following reasons:

1. On this date respondent has filed a brief in opposition to granting the petition for writ of certiorari in the above-captioned cause;

2. Respondent is a prisoner in the Missouri Department of Corrections, has no means of income, and is without funds to pay the costs or fees in this cause;

3. Upon a showing of indigency in the Circuit Court of St. Louis County, Missouri, Michael J. Gorla was appointed to represent respondent and has represented him throughout the trial and appeals in state court;

4. Respondent was granted leave to file his appeal to the Missouri Supreme Court in forma pauperis following the judgment and sentence of the trial court;

5. Respondent has filed a petition for writ of certiorari in forma pauperis in this Court in Cause Number 80-6055, docketed on January 14, 1981.

6. Respondent's financial status is identical to what it was on January 14, 1981, and Respondent's Affidavit in Support of Motion to Proceed in Forma Pauperis which was filed in Cause Number 80-6055 is attached hereto.

WHEREFORE, for the foregoing reasons, respondent requests leave to proceed in forma pauperis.

Respectfully submitted,

Michael J. Gorla

MICHAEL J. GORLA
Attorney for Respondent Williams
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

A F F I D A V I T

MICHAEL J. GORLA, being first duly sworn on his oath, states that he is an attorney licensed to practice law in the State of Missouri and is a member of the Bar of the United States Supreme Court. Affiant further states that he represents respondent in this cause and the facts stated in the foregoing Motion for Leave to Proceed in Forma Pauperis are true to the best of his knowledge and belief.

Michael J. Gorla
MICHAEL J. GORLA

Subscribed and sworn to before me this 9 day of April, 1981.

Catherine M. Dolan
Notary Public

My Commission Expires: 10-7-84

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI, Petitioner, v. DONALD GREER, Respondent, *	Cause No. 80-997 (Previously submitted in Cause No. 80-6055)
STATE OF MISSOURI, Petitioner, v. TOMMY BRYANT KENDRICK, Respondent, *	
STATE OF MISSOURI, Petitioner, v. ROLLAN ANTHONY WILLIAMS, Respondent.	

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

Affiant states as follows:

1. I, Rollan Anthony Williams, am filing in this Court, through my attorney, a cross-petition for writ of certiorari in the above-captioned cause;

2. I am presently incarcerated in the Missouri Department of Corrections under a sentence imposed upon me in connection with the above-captioned cause;

3. I have no means of income and I am without funds to pay the costs of this proceeding or to give security therefor;

4. I have been represented by Michael J. Gorla, an attorney appointed by the Court, throughout the proceedings in state court;

5. The cross-petition for writ of certiorari in the above-captioned cause is taken in good faith upon my belief that I am entitled to redress.

Rollan A Williams #37240
ROLLAN ANTHONY WILLIAMS

Subscribed and sworn to before me this _____ day of _____, 198 .

Robert A. Foreman
NOTARY PUBLIC

My Commission Expires:

ROBERT A. FOREMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 1, 1984

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

A F F I D A V I T

Comes now Michael Joseph Gorla, duly deposed and sworn, and states as follows:

1. I am an attorney licensed to practice law in the State of Missouri, and a member of the Bar of the United States Supreme Court.

2. I have been appointed in the Circuit Court of St. Louis County, State of Missouri, to represent Rollan Anthony Williams, both at his trial and on appeal, and I am the attorney for Mr. Williams on his cross-petition for certiorari styled Rollan A. Williams v. Missouri, Cause Number 80-6055, docketed January 14, 1981, and I also represent Mr. Williams as a respondent in State of Missouri v. Rollan A. Williams, et al, Cause Number 80-997, docketed December 15, 1980.

3. On April 9, 1981, respondent Williams placed in the mail at the United States Post Office in Clayton, Missouri, the appropriate number of his brief in opposition to the State of Missouri's petition for writ of certiorari in Cause Number 80-997 addressed, first class postage prepaid, to the United States Supreme Court in Washington, D.C. Respondent also placed in the mail one copy of the brief in opposition addressed, first class postage prepaid, to each attorney of record in Cause Number 80-997; Mr. Paul Robert Otto, Assistant Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102; Mr. Phillip Schwarz, Esq., Traders Bank Building, Suite 1510, 1125 Grand, Kansas City, Missouri 64106; Mr. David Robards, Esq., Public Defender, Jasper County Courthouse, Joplin, Missouri 64801.

4. Pursuant to Supreme Court Rule 28.2, respondent submits this affidavit to show timely filing and proper service.

Michael J. Gorla
MICHAEL JOSEPH GORLA

Subscribed and sworn to before me this 9 day of April, 1981.

Catherine M. Dolan
Notary Public

My Commission Expires: 12-7-84

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
DONALD GREER,	)	
	)	
Respondent,	)	
	)	Cause No. 80-997
*	)	
	)	
STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TOMMY BRYANT KENDRICK,	)	
	)	
Respondent,	)	
	)	
*	)	
	)	
STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
ROLLAN ANTHONY WILLIAMS,	)	
	)	
Respondent.	)	

BRIEF IN OPPOSITION
TO GRANTING PETITION FOR WRIT OF CERTIORARI

MICHAEL J. GORLA
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

Attorney for Respondent Rollan Anthony Williams

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery §560.120, RSMo. 1969, and armed criminal action §559.225 RSMo. Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter, and where the Supreme Court of Missouri has held that the state legislature has intended that punishment be separately imposed for both offenses?

2. Whether the Missouri Supreme Court's most recent decision in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), vacated, 446 U.S. 962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ____U.S.____, 101 S.Ct. 953 (1981), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violated the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in Brintley v. Michigan, 444 U.S. 948 (1979)?; therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, §750.529, M.C.L.A., and possession of a firearm during the commission of a felony, §750.227(b), M.C.L.A..

3. Whether the Missouri Supreme Court's most recent decision in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), vacated 446 U.S.

962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 953 (1981), conflicts with this Court's decision rendered in Whalen v. Unites States, 445 U.S. 684 (1980)?

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OPINION BELOW

The opinion of the Missouri Supreme Court in the case of State of Missouri v. Rollan Anthony Williams is reported at 606 S.W.2d 777 (Mo. 1980). A copy of the opinion appears in Appendix A of the State of Missouri's petition.

STATEMENT OF THE CASE

Respondent Williams was charged by way of amended information with counts I and III, robbery in the first degree, §560.120, RSMo 1969, and counts II and IV, armed criminal action §559.225 RSMo Supp. 1976. After a jury trial, respondent was convicted on all four (4) counts and sentenced to a term of life imprisonment on each count, with said terms ordered to run concurrent.

On appeal, the Missouri Supreme Court vacated the armed criminal action convictions relying upon the authority of Sours v. State, 543 S.W.2d 208 (Mo. banc 1980), vacated, 446 U.S. 962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ____ U.S. ____, 101 St. Ct. 953 (1981).

THE REASONS FOR DENYING THE WRIT

Respondent submits that a writ of certiorari should not issue to review the judgment of the Missouri Supreme Court on the questions presented by the petitioner because said judgment is in accordance with the applicable decisions of this Court.

As stated in the petition for writ of certiorari, the decision of the Missouri Supreme Court in this case is based upon its holding in the case of Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), vacated, 446 U.S. 962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 953 (1981). In the original Sours decision, the Missouri Supreme Court held that : 1) The offense of armed criminal action, §559.225, RSMo Supp. 1976, and its underlying felony offense are the same offense under the test articulated in Blockburger v. United States, 284 U.S. 299 (1932), because proof of the armed criminal action cannot be had without proof of the underlying felony; and 2) The prosecution and conviction of a defendant on both armed criminal action and the underlying felony in a single proceeding constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in the original Sours decision in Missouri v. Sours, 446 U.S. 962 (1980), and remanded the case to the Missouri Supreme Court for reconsideration in light of Whalen v. United States, 445 U.S. 684 (1980). On remand, the Missouri Supreme Court held that the

Whalen decision did not disturb its original holding in Sours, and reaffirmed its earlier decision. Sours v. State, 603 S.W.2d 592 (Mo. banc 1980).

Petitioner contends that the Missouri Supreme Court has misinterpreted this Court's decision in Whalen, supra, and that Sours' conclusion that the federal double jeopardy clause bars the prosecution and conviction of a defendant on the charges of armed criminal action and the underlying felony in a single proceeding conflicts with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948 (1979), and the applicable decisions of this Court. Respondent respectfully disagrees.

In Whalen, the District of Columbia Court of Appeals affirmed the consecutive sentences imposed in a single prosecution for the offense of rape and the offense of felony murder, the killing committed in perpetration of the rape. This Court reversed on the finding that Congress had not authorized consecutive sentences for the two offenses and thus the trial court had exceeded its authority in imposing consecutive sentences.

Contrary to the State of Missouri's argument in its petition for certiorari, the majority opinion in Whalen did not conclude that a defendant can be punished in one proceeding for two crimes if the legislature so intends even though both offenses are considered the same offense under the Blockburger test. Petitioner bases its interpretation of Whalen on language contained in the concurring and dissenting opinions. It appears that such a view may be held by the Chief Justice, Justices White, Rehnquist and Blackman, but the fact is that the majority in Whalen did not reach that issue, and did not so hold. The majority in Whalen

made it clear that it was basing its decision on statutory interpretation and not on constitutional grounds. Since this Court found that Congress did not intend to punish a defendant both for rape and the killing committed in the perpetration of said rape, the Whalen case was disposed of without resort to the application of the double jeopardy clause of the Fifth Amendment.

The Missouri Supreme Court correctly interpreted and applied Whalen in its reconsideration of Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). After examining the legislative intent behind the armed criminal action statute, §559.225 RSMo Supp. 1976, and applying every possible test and standard available for statutory construction, the Missouri Supreme Court concluded that the "General Assembly did clearly intend to impose two punishments for armed criminal action and the lesser included offense." Sours v. State, supra, 603 S.W.2d at 603. The statutory interpretation which was dipositive of the issue in Whalen does not solve the problem in Sours.

Petitioner also contends that the Sours decisions conflict with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948 (1979). As set out in the State of Missouri's petition at page 8, the following question was sought to be presented in Brintley:

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, §750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation

> of §750.227(b) where there is no evidence that weapon has been possessed for any other purpose than the commission of underlying felony, where underlying felony is specifically charged as a felony element of firearms possession charge, and where (in armed robber case) state has already augumented punishment for armed robberies above punishment imposed for unarmed robberies. 26 Crim.L.Rep. 4113 (§750.227(b), M.C.L.A. appears in Appendix D of State's Petition).

What is not pointed out in the petition for certiorari is that in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 794 (1979), one of the cases consolidated in Brintley, the Michigan Supreme Court determined that the Michigan felony firearms statute and the underlying felony were distinct and separate offenses. This Court is bound by the construction of a state statute by the highest court of a state, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973), and thus, this Court's dismissal for no substantial federal question in Brintley was warranted by the Michigan Supreme Court's finding that the felony firearms statute and the underlying felony are not the same offense. As stated earlier herein, the Missouri Supreme Court in Sours v. State, supra, has determined that armed criminal action, and the underlying felony are the same offense, and so, this Court's summary dismissal in Brintley is inapplicable to the situation in Missouri.

Finally, petitioner contends that the Sours decisions conflict with the applicable decisions of this Court interpreting the meaning and scope of the double jeopardy clause of the U.S. Constitution. The Missouri Supreme Court has set out a complete and thorough analysis of the law in this area, and its analysis correctly interprets and applies the decision of this Court. Sours v. State, supra, 593 S.W.2d at 211-214, 218-221; 603 S.W.2d at

603-606. Said analysis emphasizes that this Court has consistently stated that the double jeopardy clause of the U.S. Constitution serves three purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969); Brown v. Ohio, 432 U.S. 161 (1977); Harris v. Oklahoma, 433 U.S. 682 (1977); Illinois v. Vitale, ____ U.S. ____, 100 S.Ct. 2260 (1980).

While Petitioner contends that the above authorities apply in situations involving successive prosecutions and that the legislature can authorize punishment in a single proceeding for both an offense and a lesser included offense, such is not correct. While the first two purposes of double jeopardy deal with the problem of successive prosecutions, the third purpose does not. In fact, if the multiple punishment protection dealt only with successive prosecutions, then the third purpose would be nothing more than a restatement of the other two. The protection against multiple punishment for the same offense would be rendered useless were the state able to do in one prosecution what it cannot do in two prosecutions. Regarding the petitioner's contention that the legislature can constitutionally authorize punishment for both an offense and a lesser included offense, if that were true, the protection against multiple punishment, which was recently cited with approval in Illinois v. Vitale, supra, would become a nullity.

As stated earlier, the Missouri Supreme Court has decided that armed criminal action §559.225 RSMo Supp. 1976, and the underlying felony are the same offense, and that the Missouri legislature has intended to separately punish both offenses. This Court is bound by the Missouri Supreme Court's interpretation of Missouri statutes. Memorial Hospital v. Maricopa County, supra. Therefore, applying the teachings of this Court, to prosecute and convict a defendant of both armed criminal action and the underlying felony constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, respondent submits that petitioner's writ of certiorari be denied.

Respectfully submitted,

Michael J. Gorla
MICHAEL J. GORLA, 26399
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

Attorney for Respondent Rollan Anthony Williams

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